11-6-2013

State v. Moore Appellant's Reply Brief Dckt. 40210

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. MARTHA LORRAINE MOORE, Defendant-Appellant.	NO. 40210 BANNOCK COUNTY NO. CR 2011-4716 REPLY BRIEF

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

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STATEMENT OF THE CASE

Nature of the Case

Martha Moore appeals pursuant to her conditional guilty plea, challenging the district court's decision to deny her motion to suppress evidence found pursuant to an illegal search. The State concedes that the officers' search was not justified by the terms of Mr. McInelly's (Ms. Moore's adult son) probation. That leaves only consent as a possible justification for the warrantless search in this case. Ms. Moore contends that the consent on which the State relies was not, in light of the totality of the circumstances, voluntarily given.

The State argues that, since the two probation officers testified that Ms. Moore had not resisted their search (Ms. Moore testified that they told her that they were authorized to search the house pursuant to Mr. McInelly's probation), the consent was valid. However, the *totality* of the circumstances, which includes Officer Foltz's testimony regarding the nature of the search, indicates that the officers were, at least implicitly, relying on the terms of Mr. McInelly's probation to justify the search, and that Ms. Moore merely acquiesced to their claim of authority. Combined with the fact that there were five uniformed, armed officers present, the totality of the circumstances demonstrate that Ms. Moore's consent was not voluntarily given, and thus, the district court's refusal to suppress the subsequently-discovered evidence was in error.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Ms. Moore's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Whether the district court erred by not suppressing the evidence found during an illegal search which was conducted without the voluntary, knowing, and intelligent consent of Ms. Moore.

ARGUMENT

The District Court Erred By Not Suppressing The Evidence Found During An Illegal Search Which Was Conducted Without The Voluntary, Knowing, And Intelligent Consent Of Ms. Moore

A. Introduction

The State concedes that Mr. McInelly's waiver of his Fourth Amendment rights did not authorize the officers to search Ms. Moore's bedroom or her purse. (Resp. Br., pp.8-9.) Therefore, the search was valid only if Ms. Moore gave voluntary consent to search her bedroom and her purse. The totality of the circumstances shows that she did not give voluntary consent. Rather, they show that she, in the presence of five uniformed and armed officers, acquiesced to the erroneous assertion of authority to search pursuant to the terms of Mr. McInelly's probation. Therefore, the search violated her Fourth Amendment rights to be free from warrantless searches, and the evidence found as a result of that search should have been suppressed.

B. Ms. Moore Did Not Give Voluntary Consent To Search Her Bedroom Or Her Purse

First, the State asserts that "[Ms.] Moore does not challenge the district court's finding that officers were lawfully in her home to search for evidence relating to possible violations of Mr. McInelly's probation." (Resp. Br., p.8.) Ms. Moore has made no such admission, as she is challenging whether there was a lawful search of her home and property, especially those portions of the home for which Mr. McInelly could not authorize searches (namely, Ms. Moore's bedroom and purse). The officers were not, in point of fact, present to "search for evidence relating to possible violations of Mr. McInelly's probation" as the State claims. The record is very clear that the officers

were only there to execute an arrest warrant for Mr. McInelly. (*See, e.g.,* Tr., p.8, Ls.22-25 (Officer Guiberson testifying "I [was] also going to Mr. McInelly's residence to arrest him on an outstanding warrant."); R., p.63 (the district court stating "The purpose of the visit was to find and arrest McInelly on a bench warrant").) The State appears to have confused execution of an arrest warrant with an investigation for potential violations, which is wholly improper. "An entry into a home to execute an arrest warrant is for the limited purpose of accomplishing the arrest of the individual named in the warrant."[1] *State v. Northover*, 133 Idaho 655, 658 (Ct. App. 1999); *see also Payton v. New York*, 445 U.S. 573, 603 (1980). For the entry pursuant to an arrest warrant to be lawful, the officers must "demonstrate a reasonable belief that the arrestee could be found within the residence at the time of entry." *Id.* Ms. Moore does not challenge the officer's initial entry, but she has challenged their subsequent actions, particularly those undertaken after the officers confirmed that Mr. McInelly was *not* present, such as the search of her bedroom and her purse.

Arrest warrants do not give the officers *carte blanche* to search the house: "'the officers may not intrude into the house over the objection of the arrestee, simply to complete effectuation of the arrest and put the officers into a position where they can

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[1] Certainly, as part of that initial entry, the officers were entitled to conduct a protective sweep of the house. *See Northover*, 133 Idaho at 660. However, the officers performed that sweep while Ms. Moore was in the bathroom. (Tr., p.17, L.16 - p.18, L.1; Tr., p.51, Ls.14-17.) Evidently, they found nothing disconcerting during that sweep, as they did not arrest Ms. Moore upon her emergence from the bathroom. At any rate, the protective sweep would not justify the search of Ms. Moore's purse, since a person could not have been hiding inside her purse. *See Maryland v. Buie*, 494 U.S. 325, 327 (1990) (a protective sweep is narrowly confined to a visual inspection of places where a person might be hiding). As such, the premise asserted by the State, that the officers were lawfully present to search for evidence of a probation violation, is directly contrary to the facts in the record, as well as established case law, and so should be rejected.

more fully observe the interior of the premises—absent any other reasonable justification for the entry, such as consent to a search . . . .'" *State v. Coma*, 133 Idaho 29, 32 (Ct. App. 1999) (quoting *State v. Peterson*, 108 Idaho 463, 465 (Ct. App. 1985)). Exceeding the limited scope of the arrest warrant constitutes an impermissible invasion of the person's Fourth Amendment rights. *Id.*; *Peterson*, 108 Idaho at 465. As such, the officers were not lawfully in Ms. Moore's house to search for evidence of probation violations, as the State contends. They still needed valid consent to be present and search the house as they did, and Ms. Moore did not give valid consent.[2]

The remainder of the State's arguments in regard to the voluntariness of Ms. Moore's consent center around the testimony of Officer Guiberson and Officer Aldous, who both testified that Ms. Moore consented to Officer Guiberson's request to search Ms. Moore's bedroom and purse and did not resist that search. (Resp. Br., pp.9-12.) The fact that she did not resist their search shows nothing more than acquiescence to the officer's assertions of a right to search. Additionally, whether or not Ms. Moore gave consent is not the issue; the issue is whether that consent was voluntary or, instead, whether it was the product of the officers overbearing Ms. Moore's will. (*See* App. Br., pp.10-12.) Such testimony as the State relies on in this regard "is evidence only of consent, not proof of its voluntariness." *State v. Jaborra*, 143 Idaho 94,

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[2] In fact, the fact that the officers lost their reasonable belief that Mr. McInelly was present when they confirmed Mr. McInelly was not at the house is a factor demonstrating that Ms. Moore's subsequent consent was not voluntary, since the officers' continued presence in Ms. Moore's house was no longer justified by the warrant. (*See* App. Br., p.12 (discussing the fact that only Ms. Moore and her teenage son were present as a fact to be considered in the totality of the circumstances regarding voluntariness of Ms. Moore's consent).)

98 (Ct. App. 2006). As such, those arguments should be disregarded. Ultimately, the totality of the circumstances shows that Ms. Moore's consent was not voluntary.

First, Ms. Moore was surrounded by uniformed, armed officers, three of whom were inside her house while two others waited outside. (Tr., p.40, Ls.8-18.) The State admits that this is one factor that should be considered in the totality of the circumstances. (Resp. Br., p.12) While not dispositive, the fact that a citizen is surrounded by multiple uniformed and armed officers does carry weight indicating that the consent was not voluntary. *Compare Jaborra*, 143 Idaho at 98.

In addition, the officers represented that they had a legal right to search the premises pursuant to Mr. McInelly's probation. (Tr., p.78, Ls.14-17; Tr., p.83, Ls.9-10.) The State contends that Ms. Moore's testimony in this regard should be disregarded based on the district court's weighing of creditability. (*See* Resp. Br., pp.10-11.) However, the district court's analysis in that regard was primarily directed at resolving the conflict of whether Mr. McInelly continued to reside in Ms. Moore's home. (R, pp.64, 67.) The district court did not state that Ms. Moore was a wholly uncredible witness; merely that it did not believe her in regard to whether Mr. McInelly was still living in her home. (*See* R., pp.62-68.)

Regarding the question of whether the officers represented that they had the lawful authority to search the house pursuant to the terms of Mr. McInelly's probation, Officer Foltz's testimony, which is not discussed in the Respondent's Brief, reinforces Ms. Moore's testimony that the officers were (mistakenly) operating under the authority of the probation agreement as they conducted their search. Officer Foltz, the other officer who entered Ms. Moore's home, testified that he was relying on Officer

Guiberson to instruct him where he could search pursuant to the terms of their target's probation agreement. (Tr., p.64, Ls.21-24, p.71, Ls.1-21.) This indicates that the officers were using the probation agreement as the justification for their search of Ms. Moore's home, despite the fact that they had confirmed that the target of their arrest warrant was not there.[3] Besides that, by Officer Guiberson's own admission, the search was to determine whether the house was an appropriate residence for a probationer.[4] (Tr., p.24, Ls.2-7.) That information reinforces that the officers were justifying their search to Ms. Moore based on the terms of the probation agreement, and corroborates Ms. Moore's claim that the officers told her that they had the authority to search her home, which, as the State conceded, they could not do in regard to Ms. Moore's bedroom and purse.

The State also attempts to rely on the discussion that Officer Guiberson purportedly had with Ms. Moore prior to Mr. McInelly's release as evidence that she consented to Officer Guiberson's subsequent search. (Resp. Br., p.7.) During that conversation, Officer Guiberson purportedly informed Ms. Moore that, as part of Mr. McInelly's probation, she would be allowed to search Ms. Moore's house. (R., p.66.) However, as the State conceded, that is not entirely true. As such, it only means that

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[3] They actually had a fairly reliable idea of where he would be, since Officer Guiberson had told Mr. McInelly to meet her at the probation office in fifteen minutes. (Tr., p.21, L.18 - p.22, L.4.) However, Officer Guiberson decided not to go and prepare for that meeting, but rather, stayed to search Ms. Moore's home. (*See* Tr., p.22, Ls.5-18.)

[4] Officer Guiberson's testimony, that she could not remember explicitly telling Ms. Moore that she could search the whole house pursuant to the terms of Mr. McInelly's probation (Tr., p.46, Ls.10-15), does not directly contradict Ms. Moore's testimony that such a comment was made (direct contradiction would be something like "I did not say that."). As such, there was no direct evidence contradicting Ms. Moore's testimony on that point.

the erroneous representation was repeated to Ms. Moore on multiple occasions, reinforcing the coercive effect of those erroneous representations to Ms. Moore.

Therefore, the totality of the circumstances surrounding the search demonstrates that Ms. Moore's consent was not voluntary because it was merely acquiescing to an erroneous assertion of legal right to search. *See Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968); *State v. Tietsort*, 145 Idaho 112, 118 (Ct. App. 2007). As such, her consent does not justify the warrantless search, and the evidence found as a result should have been suppressed.

CONCLUSION

Ms. Moore respectfully requests that this Court reverse the district court's order denying her motion to suppress and remand this case for further proceedings.

DATED this 6th day of November, 2013.

BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6th day of November, 2013, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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